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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHEVRON U.S.A., INC., Plaintiff and Respondent, v. MANSOOR GHANEEIAN, Defendant and Appellant.	G045489 (Super. Ct. No. 30-2010-00346530) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Law Offices of Murray Robertson and Murray Robertson for Defendant and Appellant.

Brown, Wegner & Berliner, Matthew K. Wegner, Matthew A. Berliner, and Katherine R. Stevens, for Plaintiff and Respondent.

* * *

Defendant Mansoor Ghaneeian appeals from a judgment for plaintiff Chevron U.S.A., Inc., on its breach of contract cause of action. He contends a lease by which his corporation would operate plaintiff's gas station effected a novation of his individual guaranty of the corporation's debts to plaintiff. But the lease's plain language shows no novation. We affirm.

FACTS

Plaintiff leased a Newport Beach gas station to Floretino Apeles pursuant to a written agreement (the 1995 Dealer Lease). Defendant and Apeles later formed a corporation — M&M Petroleum Services, Inc. (M&M). In 1997, M&M assumed Apeles' obligations under the 1995 Dealer Lease.

At plaintiff's request, defendant executed a "continuing guaranty" in favor of plaintiff (the 1997 Continuing Guaranty). It required defendant to "unconditionally guarant[y] to [plaintiff] the full payment and performance when due of all Indebtedness," which was defined as "all debts and other obligations of [M&M] to [plaintiff] of any kind . . . ." It provided: "This Guaranty is a continuing guaranty in respect to all Indebtedness created before" defendant's revocation of it by written notice. Defendant has never revoked the 1997 Continuing Guaranty.

In 1998, plaintiff and M&M entered into a new gas station lease (the 1998 Dealer Lease). It identified "**M & M PETROLEUM SERVICERS, INC**." as the "'Dealer'" leasing the gas station. The lease required M&M to "cause the following named individual **Mansour Ghaneeian** ('Operator') to meet" various conditions and perform some of M&M's lease obligations. As an individual, defendant signed the lease below the following text: "The undersigned Operator hereby agrees that Operator shall perform and comply with the provisions of section 11 of this Contract [regarding

indemnity] and hereby guarantees to Chevron the performance of all of Dealer's obligations under this contract."

The 1998 Dealer Lease also contained a "PRIOR AGREEMENTS" clause. It provided: "[T]his Lease supersedes and terminates all prior leases from [plaintiff] to Dealer covering the premises . . . . This Lease, and the Dealer Supply Contract and other written agreements between Chevron and Dealer constitute the entire agreement between Chevron and Dealer with regard to the premises."

In 2005, plaintiff and M&M entered into a new lease (the 2005 Dealer Lease). The 2005 Dealer Lease has provisions similar to the 1998 Dealer Lease concerning defendant's obligations as "'Operator'" — including the guaranty of M&M's performance — and the superseding of any prior leases.

Four years later, plaintiff sued M&M in federal court to terminate its dealership. It obtained judgment against M&M for more than $1.7 million. M&M did not satisfy the judgment.

Plaintiff then sued defendant for breach of the 1997 Continuing Guaranty, breach of the 2005 Dealer Lease, and declaratory relief. Defendant obtained summary adjudication on the cause of action for breach of the 2005 Dealer Lease.

The court conducted a bench trial on the remaining causes of action and the affirmative defense of novation. The parties stipulated to most of the relevant facts. Plaintiff called two of its employees as witnesses. One testified plaintiff's credit department requires each shareholder of any corporation that is a dealer to execute a continuing guaranty to secure the dealer's indebtedness. The other testified plaintiff's marketing department requires the majority owner of any corporation that is a dealer to be named the gas station's operator and guaranty the dealer's performance under the lease. Each testified the lease and continuing guaranties are separate agreements. Defendant did not cross-examine either witness. Nor did he call any witnesses of his own.

The court found defendant failed to establish a novation. It noted the 1998 Dealer Lease provided it was "'the entire agreement'" between plaintiff and M&M only "'with regard to the Premises'" — i.e., the gas station. But the 1997 Continuing Guaranty was not an agreement "'with regard to'" the gas station: "the two contracts (i.e., the Continuing Guaranty and the Dealer Agreement) served different purposes . . . ." The court found "Plaintiff did not intend, by words or conduct, to extinguish the former. Indeed, it would make no sense for Plaintiff to have waived a valuable right, the right to seek to recoup a debt from [a] guarantor/owner of a dealership run by a business entity, without any consideration for the waiver." It dismissed the declaratory relief cause of action as moot, and entered judgment for plaintiff for $1,745,081 plus interest.

DISCUSSION

Defendant contends the 1998 Dealer Lease effected a novation of the 1997 Continuing Guaranty. The court correctly found it did not.

"Novation is the substitution of a new obligation for an existing one." (Civ. Code, § 1530.)[1] "Novation is made: [¶] 1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; [¶] 2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or, [¶] 3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former." (§ 1531.)

"Essential to a novation is that it 'clearly appear' that the parties intended to extinguish rather than merely modify the original agreement. [Citations.] The burden of proof is on the party asserting that a novation has been consummated." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977.) "Where there is conflicting

[1] All further statutory references are to the Civil Code.

evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact. [Citation.] However where . . . the issue turns upon the meaning of a written instrument and there is no conflicting extrinsic evidence, then the question is one of law upon which a reviewing court may exercise its independent judgment." (*Id.* at p. 980.)

Plaintiff asks us to review the judgment for substantial evidence because it offered extrinsic evidence to explain the relevant documents. But how plaintiff's employees privately understood the documents is irrelevant. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3.) Plaintiff's "uncommunicated subjective intent" is inadmissible parol evidence. (*Id.* at p. 1167.) Even so, defendant does not challenge on appeal the admission of plaintiff's witnesses' testimony. Rather, it asserts "where there is no conflict in the extrinsic evidence, appellate review is wholly independent." So it is.[2] (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

We will independently construe the documents. (*Howard v. County of Amador*, *supra*, 220 Cal.App.3d at p. 980; *Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at p. 865.) We interpret their plain language reasonably, giving effect to each provision and avoiding absurdity. (§§ 1638, 1643.) "Our task is to construe the [contracts] as they are, not as [defendant] want[s] them to be. 'We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there.'" (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 361.) "In construing a contract, it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties." (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9.) "An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning. Taken in context, words still matter." (*Abers*, at p. 356.)

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[2] Any error in admitting plaintiff's extrinsic evidence is both waived and harmless.

The plain language of the 1998 Dealer Lease shows no novation of the 1997 Continuing Guaranty. The lease does not mention the guaranty, let alone expressly "extinguish the old obligation." (§ 1531, subd. 1.)

Contrary to defendant's claim, the 1998 Dealer Lease's "PRIOR AGREEMENTS" clause does not cover the 1997 Continuing Guaranty. It provides (1) the "Lease supersedes and terminates all prior leases from [plaintiff] to Dealer covering the premises," and (2) the lease and "other written agreements between Chevron and Dealer constitute the entire agreement between Chevron and Dealer with regard to the premises . . . ." But the guaranty is not a "prior lease . . . covering the premises." And the "Dealer" is M&M, not defendant. Thus, the guaranty is neither a "written agreement[] between Chevron and [M&M]" nor an "agreement between Chevron and [M&M] with regard to the premises."

Defendant unpersuasively contends the 1998 Dealer Lease must extinguish the 1997 Continuing Guaranty because it contains its own guaranty. But the two guaranties secure different obligations. Defendant's guaranty in the 1998 Dealer Lease secures only M&M's "performance of all of [M&M's] obligations under this contract." In stark contrast, defendant's guaranty in the 1997 Continuing Guaranty secures "full payment and performance" of "all debts and other obligations of [M&M] to [plaintiff] of any kind" on a "continuing" basis until "[r]evocation." Defendant's limited guaranty of M&M's performance under the lease does not automatically extinguish his broader guaranty of all of M&M's debts to plaintiff.

Defendant insists the 1998 Dealer Lease and the 1997 Continuing Guaranty must be "taken together." (§ 1642.) But we read documents together only when they "relat[e] to the same matters." (*Ibid.*) These relate to different matters. The 1998 Dealer Lease sets the terms and conditions by which M&M will rent and operate the gas station; the 1997 Continuing Guaranty obligates defendant to make good on any debt of M&M to plaintiff. For that very reason, even taking the two documents together does not help

defendant. They show defendant has secured two different sets of M&M's obligations to plaintiff, as explained above. They simply do not show the 1998 Dealer Lease effected a novation of the 1997 Continuing Guaranty.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.